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Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT DISTRICT OF UTAH, CENTRAL DIVISION

BUREAU OF CONSUMER FINANCIAL PROTECTION,

Plaintiff,

v.

PROGREXION MARKETING, INC.; PGX HOLDINGS, INC.; PROGREXION TELESERVICES, INC.; EFOLKS, LLC; CREDITREPAIR.COM, INC.; and JOHN C. HEATH, ATTORNEY AT LAW, PC, D/B/A/HEATH P.C.,

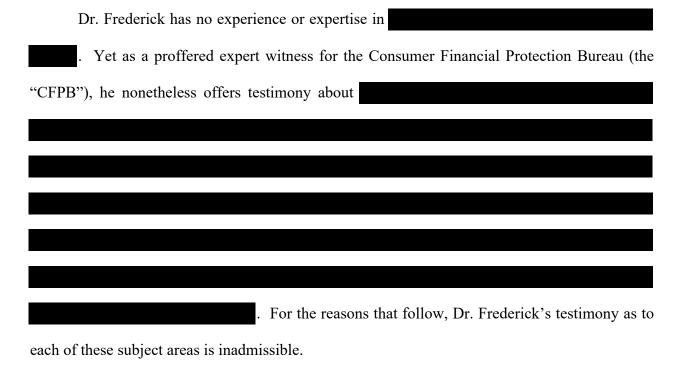
Defendants.

Case No. 2:19-CV-00298-BSJ

MOTION TO EXCLUDE THE EXPERT REPORTS AND TESTIMONY OF DR. SHANE FREDERICK

REDACTED

Defendants John C. Heath, P.C. and PGX Holdings, Inc., Progrexion Marketing, Inc., Progrexion Teleservices, Inc., CreditRepair.com, Inc., and eFolks, LLC respectfully request that the Court exclude Dr. Shane Frederick's expected expert testimony for failure to meet the reliability and relevance standards demanded by Federal Rule of Evidence 702 and interpretive case law. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993).



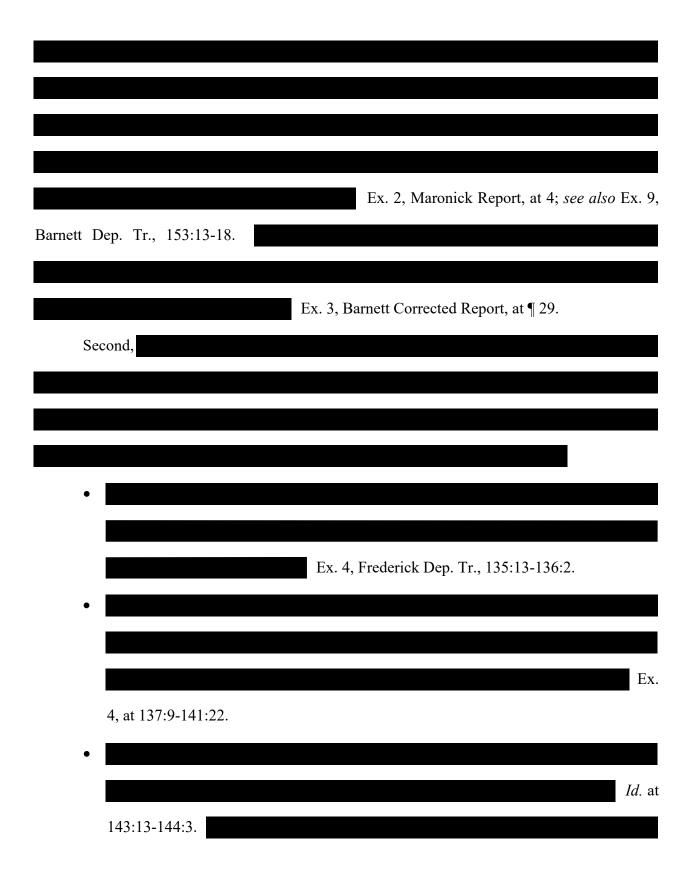
ARGUMENT

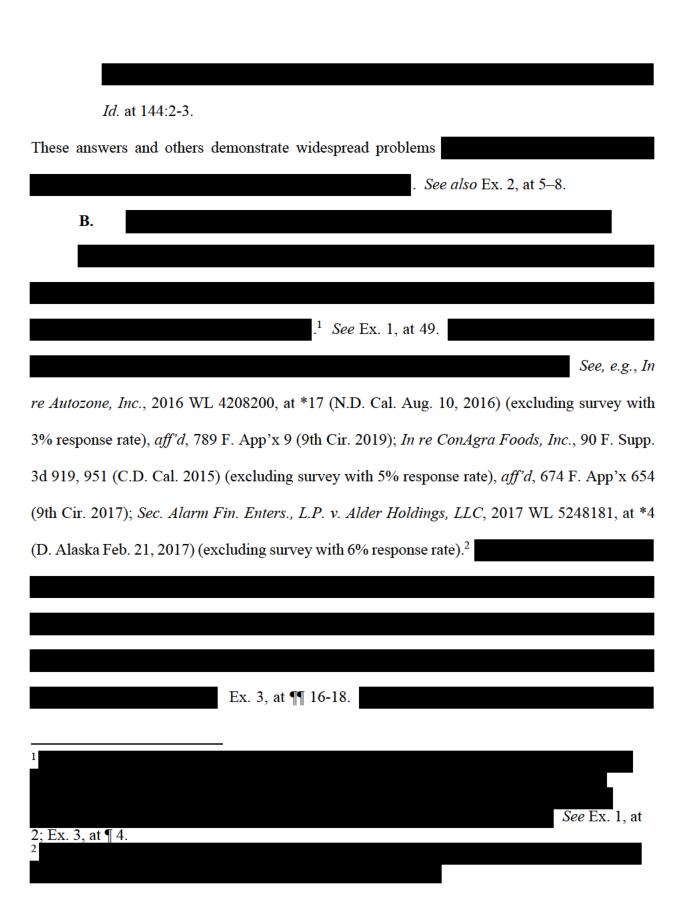
Under Fed. R. Evid. 702, an expert witness may testify to an opinion only if "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Additionally, Rule 702 "imposes a gatekeeping function on district courts to ensure expert testimony is admitted only if it is relevant

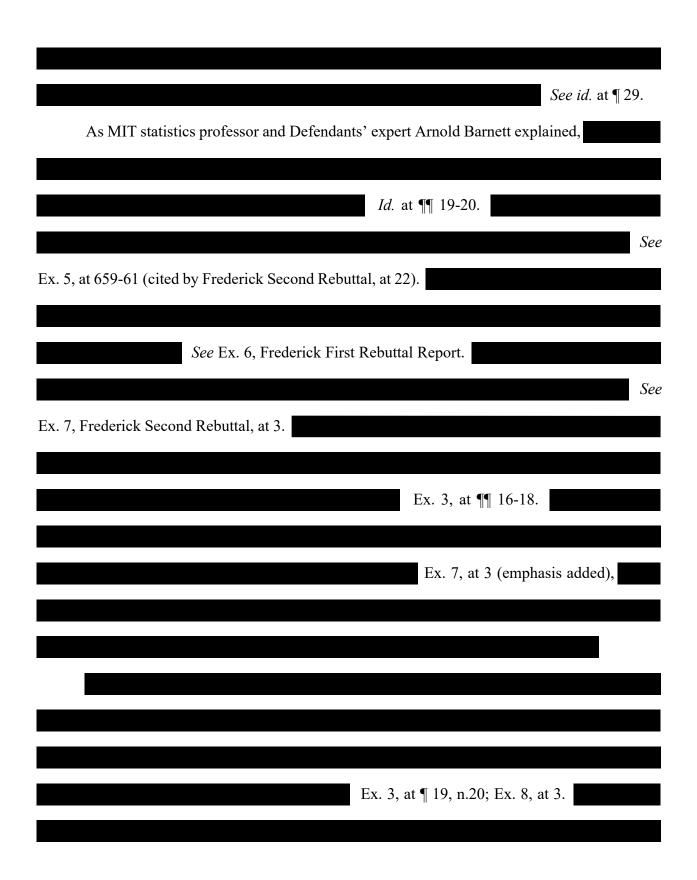
and reliable," and a court may exclude expert opinion if, *inter alia*, it determines that "there is simply too great an analytical gap between the data and the opinion proffered." *Etherton v. Owners Ins. Co.*, 829 F.3d 1209, 1217-18 (10th Cir. 2016) (citation omitted).

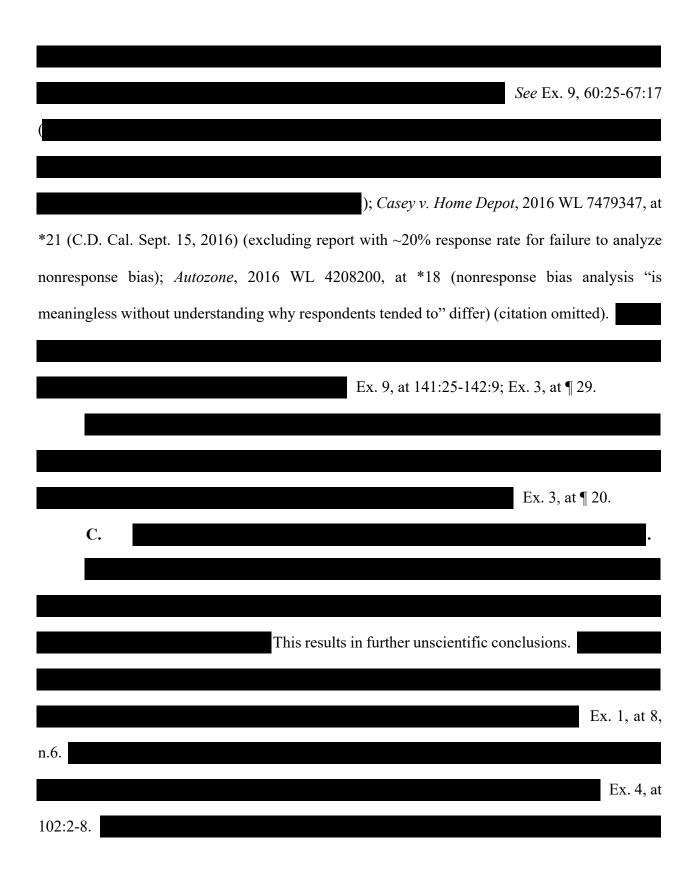
I. Is So Severely Flawed That It May Not Serve as a Reliable Basis

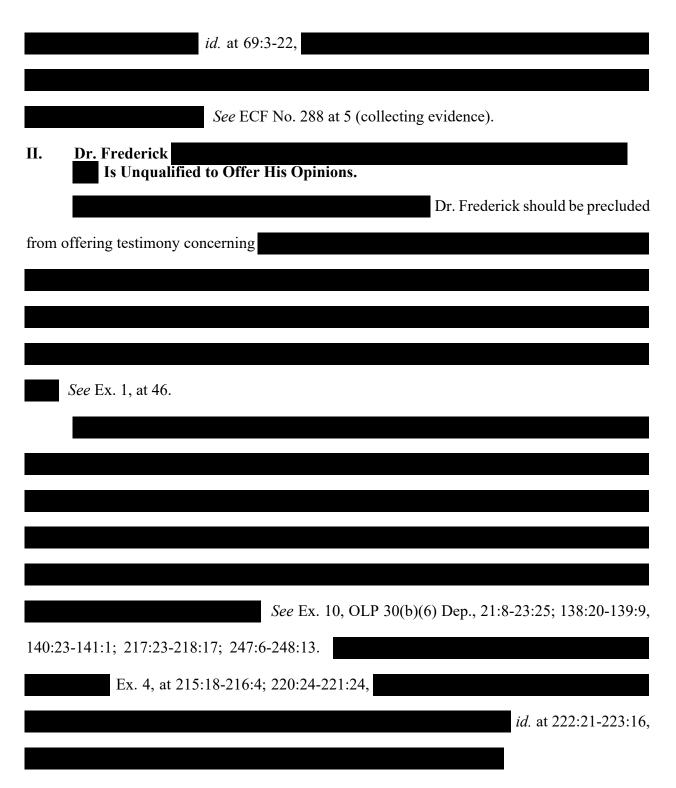
Apparently for the purpose of tarring Defendants' entire businesses and relationships with millions of consumers, Dr. Frederick attempted to any opinions or testimony pertaining to must be excluded. See Water Pik, Inc. v. Med-Sys., Inc., 726 F.3d 1136, 1145 (10th Cir. 2013) ("serious methodological flaws" rendered survey "devoid of any probative value and therefore irrelevant" and inadmissible) (citation omitted); 1-800 Contacts, Inc. v. Lens.com, Inc., 722 F.3d 1229, 1246 (10th Cir. 2013) (sufficiently "serious and pervasive" flaws render survey inadmissible). The first severe flaw is that Dr. Frederick Second, . As a result, it is improper and unscientific for Dr. Frederick to Ex. 1, Frederick Report, at 8





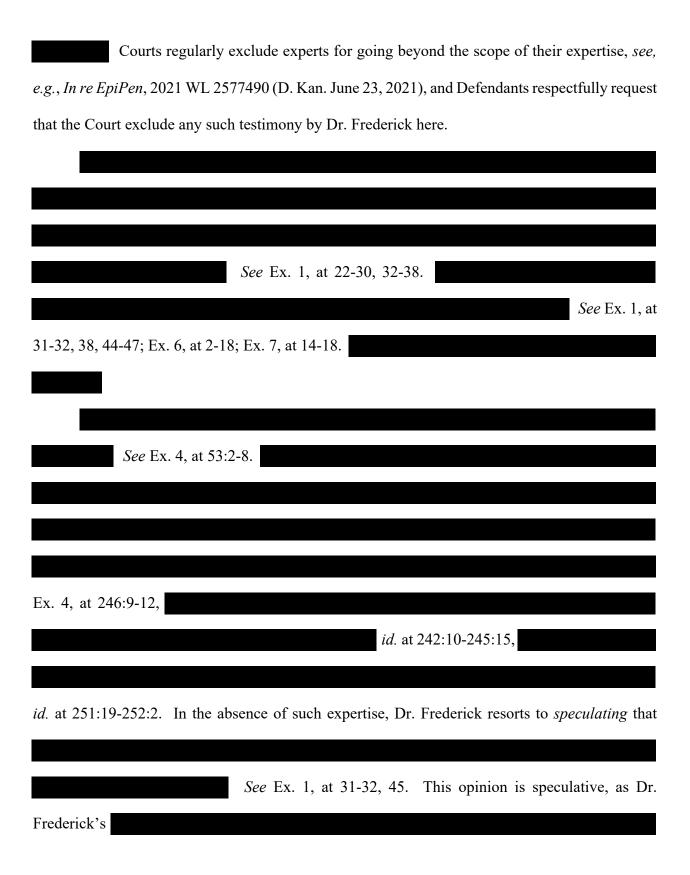






The instant case is akin to the facts in *Bruno v. Bozzuto's, Inc.*, 311 F.R.D. 124 (M.D. Pa. 2015). In *Bruno*, an expert relied upon unverified sales projections that were inconsistent with

actual sales results. Id. at 137-43. The court excluded such testimony as "inherently flawed" du
to its use of inconsistent data. Id. at 141. See also Ram v. N.M. Dep't of Env't, 2006 WL 4079623
at *16 (D.N.M. Dec. 15, 2006) (excluding expert report that relied on incomplete data); Lanted
Inc. v. Novell, Inc., 306 F.3d 1003, 1025 (10th Cir. 2002) (affirming exclusion based on unreliable
data).
Dr. Frederick i
unqualified to provide expert testimony
Ex. 1, a
20-22.
See infra § III. Dr. Frederick thus lacks any basis to
opine as an expert on whether
See Heer v. Costco Wholesale Corp., 589 F. App'x 854, 861 (10th Cir. 2014)
(excluding expert testimony "connected to existing data only by the ipse dixit of the expert"
(citation omitted).
Accordingly, Dr. Frederick's expected testimony on should be
excluded.
III.
Dr. Frederick, whose background
, lacks the necessary expertise to opine on



See Mitchell v. Gencorp Inc., 165 F.3d 778, 780 (10th Cir. 1999) (expert opinion may not be based on "subjective belief or unsupported speculation") (citation omitted).

In *EpiPen*, the court held that an expert with extensive experience in the pharmaceutical industry was not qualified to render an opinion about a medical device's mechanical issues, as the expert had never dealt with medical device engineering or manufacturing. 2021 WL 2577490, at *47-50; *see also Ho v. Michelin N. Am., Inc.*, 520 F. App'x 658, 665 (10th Cir. 2013) (general industry experience did not qualify expert to opine on design defect). Likewise, in *City of Hobbs v. Hartford Fire Insurance Co.*, the Tenth Circuit affirmed the exclusion of an insurance claims expert who lacked specialized knowledge regarding New Mexico bad faith cases and would thus be unable to provide helpful testimony to the jury. 162 F.3d 576, 586 (10th Cir. 1998).

Ex. 7, at 3-4; see also Bright v. Ohio Nat'l Life Assurance Corp., 2013 WL 121479, at *2 (N.D. Okla. Jan. 9, 2013).

As with the cases above, Dr. Frederick is simply unqualified to offer

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court exclude Dr. Shane Frederick's expected expert testimony.

Dated: April 26, 2022 Respectfully submitted,

/s/ William J. Harrington

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Attorneys for Defendants (*admitted pro hac vice)

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2022, I caused a true and correct copy of the foregoing to be served upon counsel of record as of this date by electronic filing.

/s/ William J. Harrington
William J. Harrington